

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Oct 01, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TIM M.,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:19-CV-03267-JTR

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 16, 17. Attorney D. James Tree represents Tim M. (Plaintiff); Special Assistant United States Attorney Stephen Dmetruk represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

## JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on October 13, 2011, alleging disability since July 1, 2008,<sup>1</sup> due to obesity, back pain, diabetes, high blood pressure, high cholesterol, depression, and weakness in his legs. Tr. 68. The applications were denied initially and upon reconsideration. Tr. 144-61, 164-77. Administrative Law Judge (ALJ) Ilene Sloan held a hearing June 20, 2013, Tr. 33-67, and issued an unfavorable decision on October 24, 2013, Tr. 16-27. Plaintiff requested review by the Appeals Council. The Appeals Council denied Plaintiff's request for review on January 27, 2015. Tr. 1-5. Plaintiff filed an action with this court and on March 30, 2016, the Court remanded the claim for further proceedings. Tr. 586-97.

On remand, ALJ Raymond Souza held a hearing on January 28, 2019, which was postponed in order to obtain additional evidence. Tr. 603-14. Judge Souza held another hearing on July 19, 2019 and received testimony from Plaintiff, a medical expert, and a vocational expert. Tr. 615-40. On July 31, 2019, Judge Souza issued an unfavorable decision. Tr. 556-73. Plaintiff did not file written exceptions with the Appeals Council, and the Appeals Council did not take its own review of the decision. The ALJ's July 2019 decision thus became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on November 12, 2019. ECF No. 1.

## STATEMENT OF FACTS

Plaintiff was born in 1970 and was 41 years old as of the amended alleged onset date. Tr. 572. He did not complete high school and has a work history primarily consisting of restaurant work. Tr. 38-39, 60, 349, 355, 1458. Plaintiff has

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<sup>1</sup> Plaintiff later amended his alleged onset date to September 1, 2011. Tr. 407.

1 been treated primarily for diabetes and a large hernia that has caused urinary issues  
2 and kidney disease.

### 3 **STANDARD OF REVIEW**

4 The ALJ is responsible for determining credibility, resolving conflicts in  
5 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
6 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with  
7 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
8 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
9 only if it is not supported by substantial evidence or if it is based on legal error.  
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
11 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
12 1098. Put another way, substantial evidence is such relevant evidence as a  
13 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
14 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
15 rational interpretation, the Court may not substitute its judgment for that of the  
16 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
17 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
18 administrative findings, or if conflicting evidence supports a finding of either  
19 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
20 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
21 supported by substantial evidence will be set aside if the proper legal standards  
22 were not applied in weighing the evidence and making the decision. *Browner v.*  
23 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process  
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
27 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through  
28 four, the burden of proof rests upon the claimant to establish a prima facie case of

entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) the claimant can make an adjustment to other work; and (2) the claimant can perform specific jobs that exist in the national economy. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an adjustment to other work in the national economy, the claimant will be found disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

#### ADMINISTRATIVE DECISION

On July 31, 2019, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since July 1, 2008. Tr. 562.<sup>2</sup>

At step two, the ALJ determined Plaintiff had the following severe impairments: hernia; substance abuse; alcohol abuse; and diabetes mellitus. *Id.*

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 566-67.

The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found he could perform light exertion level work with the following additional limitations:

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<sup>2</sup> Despite noting the amended alleged onset date in the Jurisdiction and Procedural History section, Tr. 559, the ALJ adjudicated the claim from the original 2008 alleged onset date. Tr. 562, 573. Therefore, the Court will review the determination from July 1, 2008 through the date of the ALJ's decision.

1 The claimant cannot climb ladders, ropes, or scaffolds, can  
 2 occasionally stoop, kneel, crouch, crawl, and climb ramps and stairs,  
 3 and can have no exposure to excessive vibration, no use of hazardous  
 4 machinery, and no exposure to unprotected heights. The claimant is  
 5 limited to occupations that require frequent reading of newspapers or  
 6 ordinary book print and ordinary hazards in the workplace, such as  
 7 boxes on the floor, doors ajar, etc. The claimant is able to understand,  
 8 remember, and carry out simple and routine instructions and tasks  
 consistent with SVP levels one and two type jobs with no strict  
 production quotas, with the emphasis being on a per shift rather than a  
 per hour basis.

9 Tr. 567.

10 At step four, the ALJ found Plaintiff had no past relevant work. Tr. 572.

11 At step five the ALJ found that, considering Plaintiff's age, education, work  
 12 experience, and residual functional capacity, there were other jobs that existed in  
 13 significant numbers in the national economy that Plaintiff could perform,  
 14 specifically identifying the representative occupations of cashier II; cleaner,  
 15 housekeeping; and garment sorter. Tr. 572-73.

16 The ALJ thus concluded Plaintiff was not under a disability within the  
 17 meaning of the Social Security Act at any time from July 1, 2008 through the date  
 18 of the decision. Tr. 573.

## 19 ISSUES

20 The question presented is whether substantial evidence supports the ALJ's  
 21 decision denying benefits and, if so, whether that decision is based on proper legal  
 22 standards.

23 Plaintiff contends the ALJ erred by (1) failing to follow the remand  
 24 instructions; (2) improperly rejecting Plaintiff's symptom testimony; (3)  
 25 improperly weighing the medical opinion evidence; and (4) improperly  
 26 determining Plaintiff's severe impairments.

## 27 DISCUSSION

### 28 1. Medical opinion evidence

1 Plaintiff argues the ALJ erred by improperly rejecting the medical opinion  
 2 evidence from Dr. Merrill, Dr. Crank, and the state agency reviewing doctors. ECF  
 3 No. 16 at 6-10.

4 When an examining physician's opinion is contradicted by another  
 5 physician, the ALJ is required to provide "specific and legitimate reasons" to reject  
 6 the opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific  
 7 and legitimate standard can be met by the ALJ setting out a detailed and thorough  
 8 summary of the facts and conflicting clinical evidence, stating his interpretation  
 9 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
 10 1989). The ALJ is required to do more than offer his conclusions, he "must set  
 11 forth his interpretations and explain why they, rather than the doctors', are  
 12 correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

13 The Commissioner may reject the opinion of a non-examining physician by  
 14 reference to specific evidence in the medical record. *Sousa v. Callahan*, 143 F.3d  
 15 1240, 1244 (9th Cir. 1998).

16 *a. Dr. Merrill*

17 On May 1, 2013, Plaintiff presented to Dr. Jeffrey Merrill for a disability  
 18 exam for Washington State DSHS benefits. Tr. 535-40. Dr. Merrill assessed  
 19 uncontrolled type 2 diabetes, right inguinal hernia, pulmonary nodule, and  
 20 lumbago. Tr. 535. He completed DSHS disability certification paperwork, opining  
 21 Plaintiff was severely impaired by his diabetes and massive hernia, and was unable  
 22 to perform even sedentary work, and that the limitations were likely to last six  
 23 months. Tr. 542-43. He opined Plaintiff would "definitely improve with treatment"  
 24 but that it would not be an overnight project. Tr. 535. Finally, Dr. Merrill noted  
 25 that even though Plaintiff had just presented for an evaluation, he felt obliged to  
 26 treat him acutely, given his uncontrolled diabetes, and noting Plaintiff was in  
 27 imminent danger of slipping into diabetic ketoacidosis. *Id.*

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1 The ALJ gave this opinion little weight, noting the exam notes from the  
2 same day documented minimal findings and the opinion was for a limited duration.  
3 Tr. 570. The ALJ stated the findings that Dr. Merrill did document regarding  
4 Plaintiff's hernia and his ill appearance were inconsistent with the record,  
5 including minimal physical exam findings, the lack of observations of Plaintiff  
6 presenting in any significant distress, and Plaintiff's minimal engagement with  
7 treatment. *Id.*

8 Plaintiff argues the ALJ's analysis is insufficient, as Dr. Merrill noted  
9 findings on exam that supported the limitations due to uncontrolled diabetes and  
10 Plaintiff's massive hernia, and the normal findings regarding his spine and  
11 musculoskeletal exams were irrelevant to the opinion. ECF No. 16 at 7. He further  
12 argued that the six-month duration was an estimate and the record contained no  
13 evidence that Plaintiff actually improved within the expected six months. *Id.* at 8.  
14 Finally, Plaintiff argues that the ALJ misinterpreted the meaning of the medical  
15 record notations of no acute distress. *Id.* at 12.<sup>3</sup> Defendant argues the ALJ  
16 reasonably interpreted Dr. Merrill's exam findings as inconsistent with the severity  
17 of the opinion, and that the remainder of the record showed Plaintiff's diabetes was  
18 not as poorly controlled as Dr. Merrill believed based on his normal blood sugar  
19 levels later in the record. ECF No. 17 at 9-11.

20 The Court finds the ALJ's analysis to be insufficient. A conflict between  
21 treatment notes and a treating provider's opinion may constitute an adequate  
22 reason to discredit the opinion of a treating physician or another treating provider.  
23 *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692-93 (9th Cir. 2009)  
24 (holding that a conflict with treatment notes is a specific and legitimate reason to  
25

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26 <sup>3</sup> Plaintiff included this argument in his challenge to the ALJ's rejection of  
27 Plaintiff's subjective complaints, and cross referenced the same argument within  
28 his discussion of the medical opinions. ECF No. 16 at 12-19.



1 reject a treating physician's opinion). Here, however, substantial evidence does not  
2 support the ALJ's conclusion. Dr. Merrill's exam findings the day of his opinion  
3 showed Plaintiff's glucose level at 415 and A1c at greater than 14%, leading Dr.  
4 Merrill to prescribe insulin and Metformin as Plaintiff was in "imminent danger"  
5 of slipping into diabetic ketoacidosis (DKA). Tr. 535, 538. He also documented his  
6 inspection of Plaintiff's hernia, which the doctor described as "mammoth." Tr.  
7 535. The fact that some other body system inspections were normal does not  
8 detract from the abnormal findings documented by Dr. Merrill.

9 Similarly, in the ALJ's general discussion of the lack of objective findings  
10 supportive of Plaintiff's claim, the ALJ noted normal musculoskeletal findings that  
11 do not contradict the abnormal findings regarding diabetes and hernia. Tr. 568-69.  
12 The ALJ's reference to Plaintiff's improved A1c readings more than two years  
13 after Dr. Merrill's exam does not negate the findings at the time of the exam.  
14 While the ALJ referenced numerous times in the record when Plaintiff appeared in  
15 no acute distress or with normal constitutional observations, Dr. Merrill noted  
16 Plaintiff to be ill appearing, and attributed this to his long uncontrolled diabetes.  
17 Tr. 535, 537.

18 Finally, with respect to the limited duration, Dr. Merrill's statement was  
19 only an estimate of how he would expect Plaintiff's condition to progress with  
20 treatment. The next treatment record was from over seven months later when  
21 Plaintiff was taken to the ER for hypoglycemia after taking his fast-acting insulin  
22 without eating. Tr. 1376. The record does not reflect any improvement in his  
23 diabetes until his June 2014 hospitalization. Tr. 1184-85. Additionally, records for  
24 the two years preceding Dr. Merrill's exam document a lack of control of his  
25 diabetes. Tr. 436 (glucose level over 600, but not in DKA); 472 (hyperglycemic in  
26 the ER, but not acidotic); 475-79 (glucose level over 600); 494 (glucose level over  
27 700); 517 (uncontrolled diabetes); 522 (poor control of diabetes). Therefore, this  
28 was not a specific and legitimate reason to disregard Dr. Merrill's opinion.



1 Whether Plaintiff's failure to engage in treatment was justifiable or explained was  
2 not an issue the ALJ addressed with any specificity, a fact that Defendant admits.  
3 ECF No. 17 at 2-3.

4 On remand, the ALJ shall reconsider Dr. Merrill's opinion and offer specific  
5 and legitimate reasons for the weight assigned.

6 *b. Dr. Crank*

7 In July 2015, Plaintiff was seen by Dr. Jeremiah Crank, who completed a  
8 DSHS disability form. Tr. 1443-56. Dr. Crank noted a primary diagnosis of a large  
9 hernia that was causing urinary retention and likely chronic kidney disease (CKD).  
10 Tr. 1443. He opined Plaintiff had severe impairment in all physical activities and  
11 was unable to meet the demands of even sedentary work. Tr. 1445. He opined  
12 Plaintiff needed referrals to a urologist and nephrologist, and a general surgeon for  
13 repair of the hernia. *Id.*

14 The ALJ gave this opinion little weight, noting Dr. Crank had not previously  
15 treated Plaintiff, and largely relied on Plaintiff's subjective statements regarding  
16 urinary retention. Tr. 571. The ALJ found this assertion inconsistent with other  
17 evidence in the record and Plaintiff's refusal of treatment for this condition. *Id.* The  
18 ALJ also found the opinion inconsistent with minimal physical exam findings, the  
19 lack of observations of significant distress, and Plaintiff's minimal engagement  
20 with treatment. *Id.*

21 Plaintiff argues the record does not indicate Dr. Crank unduly relied on  
22 Plaintiff's subjective reports, and that the record indicates ongoing urinary  
23 problems. ECF No. 16 at 8-9. Defendant argues the ALJ reasonably interpreted the  
24 record and that the Court should not reweigh the evidence.

25 The Court finds the ALJ's analysis was insufficient. As with the analysis of  
26 Dr. Merrill's opinion, the ALJ's references to the lack of objective findings are  
27 irrelevant to Dr. Crank's assessment. The record clearly documents Plaintiff's  
28 massive hernia and the resulting kidney dysfunction and urinary issues. While

1 urinary *retention* was not always the specific problem, the record documents  
2 persistent kidney and bladder problems resulting from Plaintiff's hernia, both  
3 before and after Dr. Crank's opinion. Tr. 1122 (reports kidney pain); 1170-77  
4 (hospitalized for urine retention, bladder obstruction, catheter placement); 1229  
5 (referred to a nephrologist for kidney disease "which appears to be progressing,"  
6 may need dialysis in near future); 1258 (informed urinary retention may be lethal  
7 due to kidney failure or bladder rupture, needs to follow up with nephrology and  
8 urology); 1263 (informed chronic kidney disease is likely advanced, but should  
9 improve with removal of bladder obstruction); 1329 (creatinine levels steadily  
10 increasing over past several years, likely due to diabetes and post-renal obstruction,  
11 needs catheter placement, may need dialysis within six months); 1510 (hernia  
12 causing urinary blockage and likely chronic kidney disease, able to urinate okay  
13 but likely still some obstruction); 1582 (having trouble urinating due to size of  
14 hernia); 1589-90 (recently in ER due to creatinine concentration and high urine  
15 residual volume, renal function stable). Therefore, the ALJ's implication that Dr.  
16 Crank's opinion is inconsistent with the record is not supported.

17 Because this claim is being remanded for further consideration of Dr.  
18 Merrill's opinion, the ALJ will also reconsider Dr. Crank's opinion and the  
19 limitations stemming from Plaintiff's hernia and resultant urinary problems.

20 *b. DSHS reviewing doctors*

21 Two reviewing doctors, Dr. Dalton and Dr. Palasi, reviewed Dr. Crank's  
22 opinion and concurred with the limitations. Tr. 1458, 1467. The ALJ gave these  
23 opinions no weight for the same reasons he discounted Plaintiff's subjective  
24 reports and due to their reliance on Dr. Crank. Tr. 571.

25 Because the ALJ must reconsider other medical evidence, including Dr.  
26 Crank's opinion, he shall also reevaluate the opinions of the reviewing doctors.

27 **2. Plaintiff's subjective complaints**

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1 Plaintiff contends the ALJ erred by improperly rejecting his subjective  
2 statements. ECF No. 16 at 10-19.

3 It is the province of the ALJ to evaluate a claimant's statements. *Andrews v.*  
4 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be  
5 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
6 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for  
7 rejecting the claimant's testimony must be "specific, clear and convincing."  
8 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d  
9 821, 834 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must  
10 identify what testimony is not credible and what evidence undermines the  
11 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,  
12 918 (9th Cir. 1993).

13 The ALJ concluded Plaintiff's medically determinable impairments could  
14 reasonably be expected to cause some of the alleged symptoms; however,  
15 Plaintiff's statements concerning the intensity, persistence and limiting effects of  
16 those symptoms were not entirely consistent with the medical evidence and other  
17 evidence in the record for the reasons explained in the decision. Tr. 568. The ALJ  
18 specifically found Plaintiff's allegations were inconsistent with his statements to  
19 treating providers, the record contained minimal physical examination findings and  
20 a lack of observations of Plaintiff being in distress or discomfort, and Plaintiff  
21 received minimal treatment. Tr. 568-70.

22 Because this claim is being remanded for reevaluation of the medical  
23 evidence as discussed above, the ALJ shall also reconsider Plaintiff's subjective  
24 statements. The Court notes the ALJ failed to consider with any specificity whether  
25 there were justifiable explanations for Plaintiff's minimal treatment. Tr. 570.  
26 Defendant does not dispute that the ALJ failed to consider any such justifications.  
27 ECF No. 17 at 2-3. On remand, to the extent the ALJ relies on the premise that  
28

1 Plaintiff failed to follow prescribed treatment, the ALJ must explore potential  
2 reasons for the failure. Social Security Ruling 16-3p.

3 **3. Step two findings**

4 Plaintiff argues the ALJ erred at step two by failing to find chronic kidney  
5 disease and depression to be severe impairments. ECF No. 16 at 20-21.

6 At step two of the sequential evaluation process, the ALJ must determine  
7 whether the claimant has any medically determinable severe impairments. 20  
8 C.F.R. §§ 404.1520(a)(ii), 416.920(a)(ii). An impairment is “not severe” if it does  
9 not “significantly limit” the ability to conduct “basic work activities.” 20 C.F.R.  
10 §§ 404.1522(a), 416.922(a). Basic work activities are “abilities and aptitudes  
11 necessary to do most jobs.” 20 C.F.R. §§ 404.1522(b), 416.922(b). “An  
12 impairment or combination of impairments can be found not severe only if the  
13 evidence establishes a slight abnormality that has no more than a minimal effect on  
14 an individual’s ability to work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.  
15 1996) (internal quotation marks omitted). The step-two analysis is “a de minimis  
16 screening device used to dispose of groundless claims.” *Webb v. Barnhart*, 433  
17 F.3d 683, 687 (9th Cir. 2005).

18 *a. Kidney disease*

19 The ALJ found Plaintiff’s chronic kidney failure not to be a severe  
20 impairment, noting Plaintiff’s failure to follow through with treatment and that  
21 there was little evidence of the condition causing any significant limitations on  
22 Plaintiff’s ability to perform work-related activities for a continuous 12-month  
23 period. Tr. 563.

24 Plaintiff argues the ALJ erred in failing to find his chronic kidney disease to  
25 be a severe impairment. ECF No. 16 at 20-21. Plaintiff asserts the evidence  
26 supports a finding of severe limitations and that the record indicates the condition  
27 met Listing 6.09 due to three hospitalizations for kidney disease. *Id.* Defendant  
28 argues the ALJ considered all of Plaintiff’s supported symptoms in formulating the

1 RFC, and argues the record does not document sufficient hospitalizations for  
2 kidney disease to reach listing level. ECF No. 17 at 15-18.

3 The Court finds the record does not establish sufficient hospitalizations to  
4 satisfy the requirements of Listing 6.09. The Listing requires “at least three  
5 hospitalizations within a consecutive 12-month period and occurring at least 30  
6 days apart. Each hospitalization must last at least 48 hours, including hours in a  
7 hospital emergency department immediately before the hospitalization.” 20 C.F.R.  
8 Part 404, Subpart P, Appendix 1, §6.09. Plaintiff points to his hospitalizations in  
9 June 2014, September 2014, and January 2015 as satisfying the requirements. ECF  
10 No. 16 at 21. However, the September 2014 hospitalization did not last for 48  
11 hours. Tr. 1257 (admitted 9/29/14 at 14:11, discharged 9/30/14 at 23:23).<sup>4</sup>  
12 Therefore, the requirements of the Listing are not met.

13 However, because this claim is being remanded for reconsideration of the  
14 medical evidence, including Dr. Crank’s opinion related to Plaintiff’s hernia and  
15 resultant kidney disease, the ALJ shall reconsider whether kidney disease is a  
16 severe impairment.

17 *b. Depression*

18 Plaintiff additionally argues the ALJ erred in failing to find his depressive  
19 disorder to be a severe impairment and in rejecting the opinions of all reviewing  
20 and examining doctors who assessed a severe mood disorder. ECF No. 16 at 21.  
21 Plaintiff argues the ALJ improperly separated the effects of his depressive disorder  
22  
23

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24 <sup>4</sup> Plaintiff notes in his reply brief that the hours spent in the emergency room  
25 must be counted as well, but does not cite to any evidence that Plaintiff spent an  
26 additional 15 hours in the emergency room to reach the 48 hour requirement. ECF  
27 No. 18 at 11. The Court can find no evidence of an ER visit prior to Plaintiff’s  
28 admission to the hospital on September 29.

1 from his substance use and assumed that all effects were due only to substances.  
2 *Id.*

3 The Court finds any error is harmless. Plaintiff has failed to identify any  
4 credited limitations attributable to depression that the ALJ did not include in the  
5 RFC. While the ALJ found Plaintiff's mental limitations were the result of  
6 substance use, he found Plaintiff capable of no more than simple, routine tasks  
7 with no strict production quotas. Tr. 567. The limitations included in the RFC are  
8 more extensive than those recommended by any examining or reviewing source.  
9 Tr. 75, 123, 442, 565.

10 However, on remand, the ALJ will consider any additional records  
11 submitted in reevaluating step two.

### 12 CONCLUSION

13 Plaintiff argues the ALJ's decision should be reversed and remanded for the  
14 payment of benefits. The Court has the discretion to remand the case for additional  
15 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292  
16 (9th Cir. 1996). The Court may award benefits if the record is fully developed and  
17 further administrative proceedings would serve no useful purpose. *Id.* Remand is  
18 appropriate when additional administrative proceedings could remedy defects.  
19 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court  
20 finds that further development is necessary for a proper determination to be made.

21 The ALJ's RFC determination is not supported by substantial evidence in  
22 this case and must be reevaluated. On remand, the ALJ shall reevaluate the medical  
23 evidence and Plaintiff's subjective complaints, and take into consideration any  
24 other evidence or testimony relevant to Plaintiff's disability claim in completing  
25 the five-step analysis. Additionally, as discussed above, the ALJ should consider  
26 and make specific findings regarding any exacerbation or improvement in  
27 functioning over the years or failure to comply with prescribed treatment.

28 ///

Accordingly, **IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is  
**GRANTED IN PART.**

2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
**DENIED.**

3. The matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.

4. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED.**

**IT IS SO ORDERED.**

DATED October 1, 2020.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE